IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-848

JACK A. FUSARI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act.,

Appellant,

— v. —

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA AND JUAN MIRANDA,

Appellees.

ON APPEAL FROM A SPECIAL THREE JUDGE COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANT

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OPINION BELOW

The decision appealed from is reported in 364 F. Supp. 922 (D. Conn. 1973). A copy of said decision appears in the Jurisdictional Statement, beginning at page 1A.

JURISDICTION

The judgment of the Three Judge District Court was entered on September 17, 1973. The Jurisdictional Statement was filed on November 8, 1973, and probable jurisdiction was noted in this case on February 19, 1974.

The jurisdiction of this Court rests upon 28 U.S.C. 1253. *Torres* v. *N. Y. State Department of Labor,* 402 U.S. 968 (1971); 405 U.S. 949 (1972); 410 U.S. 971 (1973).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This appeal involves the Fourteenth Amendment, U.S. Const.:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

The Statutes involved are:

The following Connecticut statutes are set forth in the Jurisdictional Statement beginning at page 26A:

§ 31-235(2)
§ 31-236(1)
§ 31-238
§ 31-241
§ 31-242
§ 31-243
§ 31-274(c)

QUESTIONS PRESENTED

1. Whether the plaintiff's administrative hearing, employing a "seated interview" system, meets minimal due process requirements of the Fourteenth Amendment to the Constitution?

2. Whether the District Court, in determining the constitutionality of Connecticut's administrative hearing, erred in receiving and considering evidence relating to the appeal period which followed the hearing in question?

STATEMENT OF THE CASE

This case involves the adequacy of administrative procedures used to determine weekly claims for Unemployment Compensation.

On June 9, 1972, Larry Steinberg and Cecil Paskewitz brought this action on behalf of themselves and all persons similarly situated seeking injunctive and declaratory relief on the grounds that certain Connecticut statutes provide for the termination or suspension of unemployment compensation benefits in violation of the due process clause of the U.S. Constitution and the "when due" provision of the Social Security Act. On November 13, 1972, the District Court allowed two of twelve intervenors to enter the case as plaintiffs.

On May 18, 1973, counsel for the defendant wrote to the Three Judge Court advising that the defendant had changed his position with regard to claimants such as the named plaintiff Cecil Paskewitz whose termination of benefits was based on monetary grounds only as opposed to non-monetary grounds such as failure to make reasonable efforts to find work, etc. (A.147a) As a result of this, the lower court excluded Paskewitz and others similarly situated from the class represented by the plaintiffs Steinberg, Triana, and Miranda. (Footnote 16, Mem. Dec. J.S. 7A)

Unemployment Insurance benefits in Connecticut are paid out of a trust fund, of which the defendant is trustee, comprised of contributions (taxes), interest, and penalties paid by employers. After an initial determination has been made that a claimant has sufficient wage credits to be eligible for benefits (monetary determination), he is instructed to report bi-weekly to his local Unemployment Compensation Office. There he fills out various forms and is given a booklet entitled "Your Rights and Responsibilities under the Connect-

icut Unemployment Compensation Law." (Def. Ex. C, A.228a and Par. 7 of Stip. to Facts, A.37a) In this booklet, the terms "available for work" and "reasonable efforts to find work" are defined on page 21 (A.250a) as follows:

> "Available for Work. You must be ready, willing and able to take any suitable job on a full-time basis."
>
> "Reasonable Efforts to Find Work. Your efforts to get a job must be the efforts which a person out of a job would make if he is sincerely looking for work."

Further information is given on pages 3 and 8 of the Booklet (A.232a and 237a) concerning eligibility requirements and the grounds for disqualification. On page 18 (A.247a) seated interviews are discussed and it is stated that such interviews are conducted to:

> "Give you information about your benefit needs;
> Answer your questions;
> Adjust your benefit payments;
> Determine your eligibility for benefits."

The department requires that a claimant be given a benefit rights interview whereby his rights under the Unemployment Compensation Law and his duties are explained.

Each time an individual makes a claim for unemployment compensation, he subscribes to a statement that avers, inter alia, that he was able and available for work during each of the prior two weeks, and that he made reasonable efforts to obtain work during said weeks. Although the claims are filed bi-weekly, benefits are awarded or denied on facts relating to each specific week. Thus, a claimant could be eligible for one of the weeks in question and ineligible or disqualified for the other week. When he reports, he presents a completed statement in which he lists his attempts to find work during

each of the preceding two weeks. Routine questions may be asked, and if no serious doubt exists as to his eligibility, the claimant receives his check and he is told to report again in two weeks unless he finds work. If a question does arise at this time concerning the claimant's eligibility, the claimant is directed to a Fact Finding Examiner for a seated interview. The claimant and Examiner discuss all relevant facts concerning the claimant's entitlement to benefits for the period in question. If requested, the claimant is given an opportunity to obtain and submit additional supporting evidence, written or oral. (Pl. Ex. #9, 51; A. 97a) The Examiner resolves any inconsistencies or contradictions, and departmental policy has been to resolve any doubts in favor of the claimant; this policy is now compelled by statute, § 31-274(c) C.G.S. which states, "(c) The provisions of this chapter shall be construed, interpreted and administered in such manner as to presume coverage, eligibility and nondisqualification in doubtful cases." (see also lines 16 through 22 on page 45 of Transc. of Proceedings of May 14, 1973, A.203a) If the Examiner determines that the claimant is disqualified for all or part of the period in question, a decision is sent to him advising him of the reasons why he was not entitled to benefits for that period, citing the appropriate statute which applies, and setting forth the manner and time to appeal the decision to an Unemployment Compensation Comissioner.

There are six Unemployment Compensation Commissioners excluding temporary commissioners appointed as needed, who hear such appeals *de novo*. The decision of a Commissioner is appealable to the Superior Court which hears the matter on the record. A further appeal may be had to the State Supreme Court. Collectively, the Commissioners are known as the Unemployment Compensation Commission. The Commission is a completely independent entity separate and apart from the defendant and the Employment Security Division,

and, pursuant to § 31-244 C.G.S., it prescribes its own regulations for the presentation and hearing of appeals.

The named plaintiff, Larry Steinberg, filed a claim for benefits in April of 1971, and received benefits for 26 weeks at $82.00 per week through October 9, 1971. On October 27, 1971, he reported again and was given a seated interview by a Fact Finding Examiner.

> "He told the Examiner that except for an inquiry at Brand Rex in May, 1971, all his efforts to obtain work had been through the hiring halls of the Ironworkers' Union. In the week ending October 23, he had gone to the hall of Local 37 in Providence and had telephoned to Local 424 in New Haven and Local 15 in Hartford. He stated that he would accept only Union work. He is not a union member but can work on a permit only after all union card holders who want work are placed." (¶ 8 of Ex. B of Orig. Comp., A. 8a)

Compensation was denied for the weeks ending October 16, and 23, 1971, by a written decision mailed on November 1, 1971, setting forth the reasons for the decision and notifying him of his right to appeal. He did appeal on November 5, 1971. (He secured employment commencing November 22, 1971.) The Unemployment Compensation Commissioner scheduled his appeal for hearing on December 2, 1971, but granted Steinberg's request for a continuance, as a result of which the hearing was not held until January 13, 1972. After a full *de novo* hearing, the Commissioner affirmed the Examiner's decision finding, inter alia, that Steinberg ". . . was given not one but several hearings on his benefit eligibility status . . .", that he ". . . had every opportunity to present information favorable to his version of the facts in his situation . . .", and that "On August 24, he was again seated and interviewed by an examiner who told him he must expend (sic) the scope of his efforts to find work, which up to that time had been mainly

to telephone or go to Locals 37 and 424 of the Iron Workers Union." (Par. 33 of Stip. to Facts, A.42a) Steinberg did not appeal to the Court. Steinberg, again out of work on December 23, 1971, filed a partial claim for the week ending December 25, 1971 and was paid $53.00. He then filed claims and was paid for subsequent weeks at the rate of $82.00 per week.

Delia Triana filed claims for and received benefits from June 12 through July 8, 1972. On July 24, 1972, she had a seated interview. As a result of her testimony at that hearing, a determination was made that she had not made sufficient efforts to find work in either of the two prior weeks. She also failed to meet the eligibility requirements at her next two bi-weekly appointments. She appealed to the Commissioner who, after a hearing, affirmed the Examiner's decision as to the first two weeks in question, but reversed his decision as to the subsequent period. This decision was not appealed.

Juan Miranda filed for and received benefits from July 2 through August 12, 1972. On or about August 30, 1972, he had a seated interview. As a result of factual information he himself provided, a determination was made that he had failed to make reasonable efforts to obtain work during the two weeks ending August 19 and August 26, 1972. He too, was sent a decision-letter advising him of the determination, explaining the reason why, and informing him of his right of appeal. He did appeal, and the Commissioner sustained his appeal. No appeal was taken from the Commissioner's decision.

Plaintiffs claim they were denied due process of law and that defendant's procedures violated the "when due" provision of the Social Security Act. The Three Judge Court for the District of Connecticut found no violation of the Social Security Act, but enjoined the defendant from following the hearing procedures in question on the grounds that said procedures failed to meet due process requirements of the Constitution. Pending disposition of this appeal by the Supreme

Court, the Three Judge Court has stayed the operation of the injunction.

SUMMARY OF ARGUMENT

Under Connecticut's Unemployment Compensation Law, a claimant, after meeting requirements necessary for a valid initiating claim, reports every two weeks at a local office to establish his eligibility for each of the two weeks just ended. Claimants are apprised by various means, including a booklet explaining their rights and obligations, as to what they must do to be eligible for each week they claim benefits. It is possible to be determined eligible for just one of the two weeks in question, and it is possible to be determined eligible for weeks immediately subsequent to a week for which benefits were denied.

When a claimant arrives at the local office he presents himself to a department employee. If no question of eligibility exists, he is paid. If a question does exist, he is referred immediately to a Fact Finding Examiner who interviews him at length. In most cases, all relevant facts are elicited from the claimant himself. If third party information is a factor, the claimant may or may not have advance notice of same, and he may or may not be able to confront the third party; this depends upon certain circumstances. The claimant is given every opportunity to rebut adverse information and allegations, and is given an opportunity to obtain supporting evidence of any kind. It is the adequacy of this hearing procedure which is at issue.

In ruling that defendant's hearing procedures deny plaintiffs due process because of certain inadequacies, the lower court cited such cases as *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and *Sniadack* v. *Family Finance Corporation*, 395 U.S. 337 (1969).

This Court recently held in *Arnett* v. *Kennedy*, ____ U.S. ____, 42 U.S.L.W. 4513, 4519, (April 16, 1974), however, that such cases

> ". . . deal with areas of the law dissimilar to one another . . . The types of . . . 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests."

What due process requires in one case, therefore, may be wholly unsuited to another. The concept takes on meaning only when it is considered in the context of a particular statutory framework. It is not one of fixed context unrelated to time, place and circumstance. *Cafeteria & Restaurant Worker's Union* v. *McElroy*, 376 U.S. 886 (1961).

> "The hearing required by the Due Process Clause must be 'meaningful', *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), and 'appropriate to the nature of the case'. *Mullane* v. *Central Hanover Bank & Trust Co.*, supra, at 303". *Bell* v. *Burson*, 402 U.S. 535, 541 (1971).

Defendant's procedures are fair to the claimant: (1) he has adequate notice; (2) he presents his claim directly to the person who makes the determination as to eligibility for the two weeks just ended, and he can bring witnesses, representation of any kind, and any type of corroborating evidence; (3) the claimant is given the opportunity to rebut any adverse information or allegations which might be brought out; (4) he has an opportunity to consult with an attorney since he alone in most cases knows whether or not he is fulfilling the eligibility requirements during the current two weeks for which he seeks benefits; (5) if he is denied benefits as a result of the facts elicited at this hearing, he

is sent a decision-letter giving the reasons for this denial and giving him information regarding appeal.

Procedures similar to this were upheld in *Torres*, and summarily affirmed by this Court. Defendant's procedures go even further than the procedures in *Torres* because in certain instances advance written notice is given claimants, and because Connecticut has a statutory presumption in claimant's favor.

The lower court determined that it had to follow *Torres* with regard to the statutory question, and therefore ruled there was no violation of the 'when due' provision of the Social Security Act. It declined following *Torres* on the constitutional question, however, on the dubious ground that Connecticut's factual situation was different. The Connecticut factual situation to which the court referred, however, was information pertaining to the statutory question: The greater time period which elapsed between the date a claimant appealed an administrator's decision and the date a decision thereon was rendered by an appeals commissioner, one who is separate and apart from the defendant. Such "evidence" is irrelevant, immaterial and incompetent hearsay, and was entered over defendant's objections. In drawing the "factual distinction," therefore, the lower court did not base its decision on any differences between New York's and Connecticut's hearing procedures. Instead, it went off on a totally extraneous tack and it drew a distinction based on time lapses which were subsequent to the conclusion of the hearing procedures invoked here and which were caused by one other than this defendant. The lower court was no doubt swayed by this prejudicial evidence, and erroneously concluded that defendant's procedures failed to afford claimants due process of law.

Because the lower court relied upon objectionable evidence, and erroneously concluded that defendant's pro-

cedures lacked due process, this Court should follow *Torres* and reverse the lower court.

ARGUMENT

I. CONNECTICUT'S PROCEDURES AFFORD DUE PROCESS.

A. The Three Judge Court Attempted to Distinguish Torres v. N.Y. State Department of Labor[1].

The lower court has followed *Torres* in ruling that Connecticut's procedures do not violate the Social Security Act. It has failed to follow *Torres* on the constitutional question, however, for one basic reason: "The factual situation of the Connecticut client is sufficiently different from that of the New Yorker to require a different result". (Mem. Dec. 18, J.S. 17A). The factual situation to which the court referred concerns the average time lapse between the date an appeal to a commissioner is filed and the date the commissioner's decision is reached. The court accepted evidence of such time periods over defendant's objections. (pp. 4a and 5a Portion of Transc. of Proceedings of May 14, 1973, A.154a and 155a; and p. 42 of Transc. of Proceedings of May 19, 1973, A.200a) Because the average time lapse was greater in Connecticut than in New York, the lower court held, ". . . the *Torres* affirmance does not foreclose an independent appraisal of the merits of plaintiffs' constitutional claim". (Mem. Dec. 19, 20, J.S. 19A). (The court also mentioned that Connecticut did not have an Aid for Dependent Children - Unemployed Parents Program, but did note the availability of "Town" assistance in Connecticut.) The key reason for the lower court's refusal to follow *Torres*, therefore, is its reliance on irrelevant evidence, entered over objection, concerning matters solely within the jurisdiction

[1] 405 U.S. 949 (1972)

of the Unemployment Compensation Commission, and which never should have been admitted and considered by the court. (Defendant will state his reasons below why the court erred in receiving and considering such evidence.)

The lower court then made a two-part inquiry into the merits of plaintiffs' due process claim. The first question was whether the plaintiffs have a sufficient "property" interest in the receipt of unemployment compensation. In its brief discussion on this point, the court cited a few cases, none concerning unemployment compensation. One case where this point might have been raised is *Sherbert* v. *Verner*, 374 U.S. 398 (1963). That case, however, determined only that South Carolina's denial of unemployment compensation benefits to a claimant who refused to apply for or accept work on Saturday because of religious beliefs imposed a burden on the Free Exercise Clause of the Constitution. This court stated, page 409,

> "Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment. . . . Finally, nothing we say today constrains the States to adopt any particular form or scheme of unemployment compensation. Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest".

Mr. Justice Douglas in his concurring opinion said, page 412,

> "This case is resolvable not in terms of what an individual can demand of government, but solely in terms of what government may not do to an individual in violation of his religious scruples".

"*Sherbert,* said the *Torres* court, page 437, has no application to the situation presented in the present case".

Most recently this Court has had occasion to consider a "property" argument in a case concerning removal procedures of a non-probationary federal employee. After citing many of the cases mentioned by the lower court in this case such as *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), *Bell* v. *Burson,* 402 U.S. 535 (1971), and *Sniadack* v. *Family Finance Corporation,* 395 U.S. 337 (1969) this Court said,

> "These cases deal with areas of the law dissimilar to one another and dissimilar to the area of government employer-employee relationships with which we deal here. The types of . . . "property" protected by the Due Process Clause vary widely, and what may be recognized under that clause in dealing with one set of interests which it protects may not be recognized in dealing with another set of interests". *Arnett* v. *Kennedy,* ____ U.S. ____, (No. 72-1118, 42 U.S.L.W. 4513, 4519, April 16, 1974).

Unemployment compensation is also dissimilar, and a decision factually denying unemployment compensation cannot create a property right to such benefits.

Unlike *Goldberg* v. *Kelly,* supra, and *Java* v. *California Department of Human Resources Development,* 402 U.S. 121 (1971), this is not a case where benefits, once granted, are abruptly suspended or terminated. This distinction is a critical one. The claimants in this case are not "recipients" of benefits for the weeks in question. Nor is it appropriate to say that the claimants are "deprived" of benefits. That word connotes a withholding of something to which an individual is entitled; there is a pejorative nuance to that word, a whiff of injustice. But there is no injustice here. No one is being "deprived" of anything to which he is entitled. It is

the very issue of entitlement which is in question here. The correct characterization of the issue is whether the procedures used to grant or deny benefits for a particular weekly claim meet due process requirements.[2]

Each time a claimant seeks benfits for a particular week he is, in effect, making a separate claim. He must demonstrate that he has looked for work, that he has not refused work, that he has been able to and available for work, and he must disclose whether he received any form of income. The facts as to each of these determinations will vary from week to week. As the *Torres* court recognized, these determinations will be based on "new factual circumstances which could not have been considered at the original eligibility interview". (333 F. Supp. 341, 344, 1971)

The point is that an individual does not have a continuing right to benefits simply because he has survived the *initial* coverage and wage credit determinations. There is no outstanding decision of entitlement as was present in *Java* and *Goldberg*. Each week the claimant must make an affirmative showing. His claim for that week is either granted or denied; there is no "termination" or "suspension". The fact that he continues to make weekly claims over a period of time gives him no special status, no property right in benefits for any one week or any series of weeks. Thus, *Goldberg* and *Java*, where the claimants had their benefits cut off while the outstanding decision was that they were eligible are not apposite here, and the lower court erred in determining that these plaintiffs have a property right which is protected by the Due Process Clause. Indeed, it could be this lack of a such property right which was the basis of this Court's affirmance of *Torres*.

The second part of the court's inquiry concerned the form of procedural due process necessary to protect the

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[2]As the court below ruled that there is no violation of the Social Security Act in this case, we have restricted our examination to the due process issue.

particular property interest involved. The court then stated its reasons why the defendant's seated interview system does not provide sufficient procedural due process.

B. Connecticut's Procedures Are Fairer Than The Procedures Upheld In Torres.

As a practical matter, we believe the lower court had difficulty distinguishing *Torres* because the similarities between the New York procedures (which were found adequate by this Court) and the Connecticut procedures are remarkably close. Let us first examine the administrative machinery available to the claimants in *Torres*. The first Three Judge *Torres* decision, 321 F. Supp. 432 (S.D.N.Y. 1971), set forth in some detail the manner in which claims are decided. Essentially, the claimant is interviewed concerning his efforts to find work, etc. and is given the opportunity of explaining any information which may appear to be inconsistent with his version of the facts. After the claims examiner has weighed the evidence and heard the claimant, a decision on eligibility for the week in question is made.

In *Torres*, one of the plaintiffs was an individual named Dinger. Like the claimants in this case, Dinger was denied benefits because the examiner concluded his search for employment was inadequate. The *Torres* court, in its decision on remand from this Court, described what happened,

> "After receiving ten benefit payments, Dinger was interviewed at an insurance office about his availability for work. On the basis of information Dinger supplied in response to questions, and on the basis of newspaper listings of available jobs, the interviewer determined that Dinger was ineligible to continue to receive benefits because he had not demonstrated 'an active, realistic and diligent search for work'. The benefits

were suspended on the basis of new factual circumstances which could not have been considered at the original eligibility interview. The *Java* decision is therefore irrelevant to plaintiff Dinger: not only was the eligibility redetermination based on new facts, but the plaintiff supplied the insurance office with those very facts at an administrative interview". (333 F. Supp. 341, 344) (S.D.N.Y. 1971)

The Connecticut procedures and the facts of the plaintiffs here bear a striking similarity to those in *Torres*. A careful review of the Connecticut procedures reveals that Connecticut is even more vigilant in protecting a claimant's rights than is New York:

(1) *The Claimant has adequate notice.*

The lower court in this case erroneously concluded that, "Claimants are provided with virtually no advance notice of the interview, or the precise issues involved, and consequently have no opportunity to either prepare their arguments or present witnesses on their behalf". (Mem. Dec. 21, J.S. 20A) The fact is, however, the department usually learns of the problem only when the claimant presents himself at the office and offers facts concerning his eligibility. The claimant knows two weeks in advance when he is next to report. If there is a problem concerning his search for work, he will surely know it before he even steps into the office.

Claimants are not totally unsophisticated in these matters nor are they ignorant of their obligations. The claimants in this case had been receiving benefits for many weeks. They had answered the same questions, and clearly knew what was required of them. It is unrealistic and naive to assume, as did the District Court, that questions concerning weekly claims come as a complete surprise to the claimant. Nor is there any mystique about what a claimant must do to

qualify. When he applies for benefits, the claimant receives the booklet entitled, "Your Rights and Responsibilities Under the Connecticut Unemployment Compensation Law". (¶ 7 of Stip. To Facts, A.37a) Included in this booklet is the admonition,

> "You must be ready, willing, and able to take any suitable job on a full-time basis",

and

> "Your efforts to get a job must be the efforts which a person out of a job would make if he is sincerely looking for work". (Def. Ex. C, 21; A. 250a)

Moreover, the booklet also describes the purpose of the seated interview, indicating that such interviews are conducted to:

> "Give you information about your benefit needs; Answer your questions; Adjust your benefit payments; Determine your eligibility for benefits". (Def. Ex. C, 18; A. 247a)

The fact that the defendant gives advance notice to claimants such as Paskewitz (monetary determination only) and to claimants who have allegedly refused a job referral, does not mean that the defendant must necessarily do likewise for all claimants. All claimants are afforded due process by defendant's procedures, and simply because different administrative procedures might be used regarding some claimants cannot change this. The mere fact that such administrative differences might be considered better, cannot mean that those who do not receive them are thereby denied due process. Put another way, just because one does something, which he does not have to do, for one person, does not mean that by so doing he necessarily must do the

same for everyone. There is, of course, also the practical reason for the difference in handling these claims, namely that the defendant is able to give advance notice in those cases because he himself has advance notice, whereas it is impossible for him to do this in all other cases because he does not know if a possible problem exists until the claimant actually comes in and tells his story.

(2) *The claimant has an opportunity to present his case.*

Again, the District Court was incorrect in stating that the claimant was barred from presenting witnesses or appearing with counsel. If the claimant knows that his work search may present a problem, he may bring witnesses with him; he may bring counsel or a union representative or anyone else he believes will be of assistance to him. He may bring documents, letters, virtually anything. If he needs time to obtain relevant evidence, he will be given this opportunity. (Pl. Ex. #9, 51; A. 97a)

In this regard the District Court has created the impression that somehow there is a presumption against the claimant, that someone is trying to trap him or short circuit his rights. Nothing could be further from the truth. Indeed, in Connecticut the claimant is armed with a presumption in his favor. § 31-274(c) C.G.S. states,

> "The provisions of this chapter shall be construed, interpreted and administered in such manner as to presume coverage, eligibility, and nondisqualification in doubtful cases".

(3) *The claimant may rebut unfavorable evidence.*

In most cases, the claimant supplies the information himself and, based on the claimant's own account, the Examiner may grant or deny benefits. In a few cases, an inquiry is initiated because a third party has submitted in-

formation which raises a question of entitlement. Should this happen, the claimant is notified as soon as possible. Advance written notice advising the claimant of the issue and his right to bring representation and witnesses is sent in all cases except those where the claimant is already scheduled to appear within two days. In such cases, claimants have the opportunity to confront the Employment Service employee who has provided information which might cause a denial of benefits. (Affid. of T. W. Hatcher, A. 150a) (The Employment Security Division of the Connecticut Labor Department is comprised of both the Employment Service and the Unemployment Compensation Department.)

When information of an alleged job refusal is supplied by a prospective employer who is not an interested party, no notice is sent to that employer because he has no real interest in the results. In that situation there is no opportunity for confrontation by the claimant. In many such instances the Examiner will telephone persons who may have relevant information. The calls are made while the claimant is being interviewed so that he can comment, deny, or explain. In those instances where the Examiner cannot reach the third party while the claimant is present, he will call again later that day if possible. The Examiner will then base his decision on all relevant facts including factors bearing on credibility, and will be mindful of the statutory presumption in favor of the claimants. This lack of opportunity for confrontation is not sufficient to constitute a violation of due process because each claimant is given every opportunity to rebut adverse allegations, and because by statute the claimant is given the benefit of any doubt which may exist. Further, it would be impossible to require a prospective employer who is not an interested party to be present at such a hearing. Although the claimants are required to be registered with the Employment Service in order to be eligible for benefits, employers register only on a voluntary basis. Such employer registration

is vital if the Employment Service is to obtain jobs for the unemployed. If such employers were forced to send personnel to hearings when they have no interest at stake, they simply would not register. The disastrous effect this would have on the Employment Service is obvious. The greater good would be served, therefore, as compared with the probable damage to the Employment Service and that part of the program aimed at getting the unemployed back to work, by allowing the defendant to continue the procedures now followed.

This Court has already upheld, in *Richardson* v. *Perales*, 402 U.S. 389, (1971), a procedure which lacked the right of confrontation and cross examination of witnesses where the claimant could present reports and testimony in rebuttal of written reports and testimony submitted against him. This holding has been followed in the very recent decision, December 14, 1973, of the U.S. Court of Appeals for the Ninth Circuit in the case of *Crow* v. *California Department of Human Resources and Development*, 490 F. 2d 580 (1973), (Cert. filed, No. 73-1015, ____ U.S. ____ 42 U.S.L.W. 3388, Dec. 28, 1973). In a two to one decision which reversed a District Court ruling, the court said, page 584, "We find the Constitution to demand here no more than is afforded by the Department's system, (regarding pretermination of unemployment compensation benefits) even though it does not require pretermination confrontation and cross-examination".

(4) *Claimant does have an opportunity to consult with an attorney.*

Here again the District Court erred. Claimants are not prohibited in any way from consulting with or being represented at such hearings by an attorney. There is no evidence whatsoever that the plaintiffs Steinberg, Triana, or Miranda even attempted or requested permission to bring an attorney to any of the local office hearings. Nor is there any statute or

regulation prohibiting such representation. True, the lower court speaks of "opportunity" to consult with an attorney as opposed to any "right" to representation. However, since it is the claimant alone in most cases who knows in advance what issues will be raised when he reports, he does have an opportunity to consult with an attorney and to then have him present when he reports if he so desires. See *Allen* v. *City of Greensboro, North Carolina,* 452 F. 2d 489 (4th Cir. 1971).

(5) *Claimants are told why benefits are denied.*

The lower court found as one of its reasons why defendant's procedures denied due process that ". . . the only explanation a claimant receives is a perfunctory citation to a statutory section concerning disqualification". (Mem. Dec. 21, J.S. 20A) This is obvious error since it was stipulated by the parties and cited by the court itself that the decision-letter states the reasons for the decision. (Mem. Dec. 3, J.S. 3A) Thus, the claimant is told exactly why and on what statutory basis the decision is made.

C. The Named Plaintiffs Have Not Been Harmed by Defendant's Procedures.

Even if it were possibile for the defendant to have known in advance what issues were to be raised at the seated interview of plaintiffs Steinberg, Triana, and Miranda, the same result would have occurred in each case. Steinberg, a college graduate, was denied benefits on the grounds that he had restricted his availability for work and because he had failed, even after being warned, to make reasonable efforts during the period in question. Triana and Miranda were both denied benefits because they had failed to make reasonable efforts. The decision made by the Fact Finding Examiner in each case was based on the facts, which facts were obtained solely from each claimant. There were no witnesses to be confronted and no cross-examination

was necessary. Thus, the only facts necessary for a determination of weekly eligibility were, as in most cases, elicited solely from the claimants themselves. And it should be noted that these plaintiffs did not appeal to the Superior Court the factual determinations of the Commissioners denying eligibility.

D. The Torres Decision Should Be Followed Rather Than Goldberg v. Kelly, Supra.

(1) *Goldberg* v. *Kelly* is distinguishable.

Plaintiffs placed great reliance on *Goldberg* in their presentation of this case before the lower court, and, although the lower court did not order the defendant to comply with all the requirements of that case, it is obvious that the *Goldberg* decision greatly influenced the lower court's rationale. This case is distinguishable, however, in a number of respects.

First, of course, *Goldberg* is a Welfare case whereas *Torres*, like this case, concerns Unemployment Compensation. In *Goldberg*, the "brutal need" of the claimants was of key importance. This is set out in the opinion in unequivocal terms:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'. . ."

397 U.S. at 263. The claimant's "brutal need", noted by the lower court, was the fulcrum on which this Court based its holding. But need is not relevant to a determination of eligibility for unemployment insurance benefits.

> " 'Unemployment compensation is greatly preferable to relief because it is given without any means test.' H.R.

> Rep. No. 615, 74th Cong., 1st Sess. 7 (1935). "Unemployment compensation differs from relief in that payments are made as a matter of right, not on a needs basis but only while the worker is involuntarily unemployed. 'H.S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935).'" *Torres*, supra, p. 437.

The difference between welfare and unemployment insurance with respect to need was pointed out by a noted authority who stated,

> ". . . *public assistance* programs provide benefits according to individual and demonstrated budgetary needs and are usually financed from so-called general revenues, i.e., tax impositions of the direct or excise type without particular connection between the class of taxpayers or transients benefited by the program. *Social insurance*, on the other hand, is characterized by benefits which are payable without proof of need and is usually financed, at least in part, by either the prospective beneficiaries themselves or a class of taxpayers upon whom these beneficiaries are economically dependent or both . . ."

Riesenfeld, *The Place of Unemployment Insurance Within the Patterns and Policies Of Protection Against Wage Loss*, 8 Vand. L. Rev. 218, 223 (1955). The distinction is of considerable importance since a delay of payments in a program predicated primarily on need may be intolerable while less protracted delays under other programs where need is not strictly relevant may be within constitutional limits.

Thus, the "crucial factor" of need which was dispositive in *Goldberg* cannot have the same impact in deciding the question of due process in unemployment insurance cases. While we cannot ignore the fact that some unemployment insurance claimants are in fact needy, we must recognize that unemployment insurance is available to rich and poor alike,

and hence it is illogical to permit the right to benefits to be accelerated in direct relation to the severity of a claimant's economic situation.

Second, the claimant in *Goldberg* had no opportunity to personally present his case to the one who made the decision; he could not confront witnesses if there were any. This failure of the New York procedures, said the Court, "was fatal". In our case, not only did the plaintiffs personally present their case to the one who made the decision, but it was their own statements which, based upon their own efforts or lack of efforts to find work, constituted the information upon which the Examiner made his decision. Each of the named-plaintiffs had already collected benefits before payments were denied. (Plaintiff Steinberg had successfully presented his claim 13 times and received unemployment compensation for twenty-six separate weeks!) Thus, the two key elements of *Goldberg* are missing here: Need is not a determinant, and the plaintiffs not only had the opportunity to personally present their case to the decision-maker, but *had* to.

(2) Unemployment Compensation differs from Welfare.

An application for unemployment insurance benefits involves not only the claimant and the state, but the private employers who fund the program. The money to pay benefits does not come from general tax revenues but from an identifiable segment of the population (employers) which is required to make contributions into a reserve fund to pay benefits. Because of this method of funding the program, the state does not have the same direct interest it has in the welfare situation where every dollar the state saves may be available for other programs which compete for state funds. In the unemployment insurance area, the state is basically neutral since it cannot use the unemployment insurance fund for other state purposes, but must simply insure that sufficient money is available in the fund to pay eligible claimants.

Further, this is a trust fund, and the defendant-administrator, as trustee, must therefore be looked upon as a fiduciary in administering it. And, as this Court recognized in *Java*, supra, p. 134, the role of the examiner is that of a neutral party. Contrary to plaintiffs' claims, these hearings are quasi-judicial so far as the defendant is concerned, and the defendant is not an adversary of either the claimant or the employer. The mere fact that Connecticut law (§ 31-248) requires the defendant to be deemed a party in all judicial appeals cannot change this.

In making a claim for unemployment compensation, an individual's actions are examined afresh each week. His weekly claims are separate and distinct claims, dependent on facts and behavior which vary from week to week. Therefore he is not continuously entitled to benefits over a period of weeks. Each week a claimant must meet the criteria established by the Connecticut Legislature for entitlement to unemployment compensation. This is in complete contrast to the welfare system. Welfare recipients, once found eligible, are presumed eligible. Although they have a duty to report any changes in their circumstances, they have, with limited exceptions, no duty to effect such change. Even exceptions such as work incentive programs, contemplate a long-term program of training for employment. Moreover, such recipients receive these benefits primarily because of the permanency of the basis of their needs such as old age, blindness, and permanent physical or mental disability. Unemployment Compensation on the other hand is designed to be only a temporary measure.

Also, unlike welfare recipients, the unemployment benefit claimant has an affirmative duty to attempt to secure employment. Each week he must demonstrate the realistic nature of that search, disclose whether he in fact worked, disclose whether he received any form of income, and whether he was physically able to work. Eligibility is a recurring ques-

tion. Ineligibility for one week does not presume subsequent ineligibility any more than a finding of eligibility for one week presumes eligibility for subsequent weeks.

The class members here are persons who have filed claims and have been collecting. The procedures were wholly familiar to them. The plaintiff Steinberg, for instance, knew he was required to perform the affirmative acts described supra. There was no question of adequate notice involved when he was again given a seated interview on October 27, 1971. He knew very well he would be called upon to explain his search for work, and he had been warned previously to improve his work search. (¶ 7, of Ex. B of Orig. Comp., A 8a) He had ample opportunity to consult an attorney about this, and could have brought an attorney with him on October 27, 1971. Because of his failure to expand his efforts to find work, Steinberg was denied benefits. Similarly, the plaintiff Triana was given benefit rights interviews on both June 27 and August 8, 1972 by a Spanish speaking department employee who also acted as interpreter for her on July 24, 1972. (Affid. of P. Collazo, Def. Ex. B; A. 145a)

E. Plaintiffs Were Afforded Due Process Of Law By Defendant's Procedures.

It is obvious from the number of plaintiffs' Exhibits, both in the lower court and in the Single Appendix, especially their Exhibits 14 through 29o which are comprised of various letters or bulletins from the defendant to local office employees, that the defendant goes to great lengths to maintain its already fair and adequate procedures. As this Court can see, these letters are generally informative and instructive, and their purpose is to guide and assist these employees in properly performing their duties and coping with various problem situations which may have arisen. They support defendant's

averment that everything possible is done to treat all claimants as fairly as possible. And fairness is really what due process is all about. ". . . the rudiments of fair play . . . are the essence of due process of law . . . ." *Kelley* v. *Metropolitan County Bd. of Ed. of Nashville & Davidson County, Tennessee,* 293 F. Supp. 485 (M.D. Tenn., 1968)

The essential elements of due process necessary for a fair and impartial determination do not require a full adversary, court-type hearing prior to such determination whether it results in the payment of benefits or not. Due process is not a brittle concept incapable of bending to accommodate differing factual circumstances. What due process requires in one case may be wholly unsuitable to another. The concept takes on meaning only when it is considered in the context of a particular statutory framework. It is not one of fixed context unrelated to time, place and circumstance. *Cafeteria and Restaurant Workers Union* v. *McElroy,* 376 U.S. 886 (1961).

> "The hearing required by the Due Process Clause must be 'meaningful.' *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965), and 'appropriate to the nature of the case.' *Mullane* v. *Central Hanover Bank & Trust Co.,* supra, at 303." *Bell* v. *Burson,* 402 U.S. 535, 541, (1971).

And in discussing notice, this Court said in *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, (1950),

> "But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' *American Land Co.* v. *Zeiss,* 219 U.S. 47, 67; and see *Blinn* v. *Nelson,* 222 U.S. 1, 7."

This Court went on to say, p. 319,

> " 'Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done.' *Blinn* v. *Nelson,* supra, 7."

Defendant cannot emphasize strongly enough that justice was done in the cases of the named plaintiffs.

Due process is a rule which seeks to achieve a balance between legitimate state interests[3] and rights of individual citizens. In *Goldberg* the Court found that the state interest did not justify the procedures employed or, in other words, that the balance was lopsided in favor of the State Welfare Department. The welfare recipient in *Goldberg* had no notice that his interests were being decided, no opportunity for a personal appearance or meaningful presentation of evidence or arguments, and no opportunity to rebut charges against him. (397 U.S. at 259)

This case is much different. Here the claimants did have notice, constructive notice at the very least, by virtue of the following: the provisions of § 31-235(2) C.G.S., the booklet concerning rights and responsibilities of claimants, the benefit rights interviews, claimant's own experience in reporting bi-weekly, and being scheduled for a specified day and time. Certainly experienced claimants such as these know in advance whether or not they are meeting or have not met the eligibility requirements for the latest two weeks. This same advance knowledge, by the claimant alone, provides him the opportunity to prepare any argument or present witnesses he deems necessary. He states his case personally to the per-

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[3]"State interests" may be a misnomer as applied to the instant situation since, the state is acting as a neutral fiduciary rather than an adverse party.

son who makes the decision, and is given every opportunity to rebut any adverse allegations. He is allowed time to obtain rebutting or corroborating testimony, oral or written.

The argument that the claimant must have the right to physically confront and cross-examine adverse witnesses and that no substitute procedure is adequate to satisfy due process is simplistic and ignores the practicalities of administering the program. Not only is there simply no adverse witness to confront in most cases, but the fact is that the department never decides a case without giving the claimant a full opportunity to not only air his own views concerning relevant facts, but also to rebut and controvert any conflicting views offered by other persons. Little is gained by slavishly adhering to labels such as "cross-examination" or "right to confrontation." The point is not whether one individual is physically present to confront another individual. The real object is to make sure that the decider of facts has enough information from both sides to make a fair decision. It is submitted that the current procedures satisfy this principle. Again, the same advance knowledge provides the claimant with the opportunity to consult an attorney. And the right to representation at the hearing is not limited to an attorney. It is not uncommon for the claimant to appear with a relative, friend, co-worker, interpreter, or union representative. The Examiner discusses all relevant points and attempts to resolve all areas of conflict.

In making his decision, he is guided by the statutory presumption in favor of the claimant where doubt exists. If anything, this procedure is weighted in favor of the claimant.

In *Java,* supra, this Court struck down procedures whereby unemployment compensation benefits, after initially being awarded, were withheld upon the filing of an appeal by the employer. In discussing with approval the type of hearing

given when such benefits are first administratively allowed, the Court stated, at page 134,

> ". . . the eligibility interview is informal and does not contemplate taking evidence in the traditional judicial sense, it has adversary characteristics and the minimum obligation of an employer is to inform the interviewer and the claimant of any disqualifying factors. So informed, the interviewer can direct the initial inquiry to identifying a frivolous or dilatory contention by either party."

Defendant's Fact Finding Examiner takes this same role in Connecticut's hearing procedures.

If a determination of eligibility following the procedure described in *Java* may be enforced immediately without violating the due process rights of any party as this Court concluded, it necessarily follows, as recognized by the *Torres* court, (333 F. Supp. 341, 344) that a determination of ineligibility following the same procedure may also be enforced without violating the due process rights of either party. It would be grossly inconsistent to maintain that the interview procedure is reliable when the result is favorable to the claimant and adverse to the employer, but that it is unreliable when the claim is denied. This Court's recent statement in *Arnett* v. *Kennedy*, supra, 4519, that ". . . a litigant in the position of appellee must take the bitter with the sweet" is most appropos. Like the appellee in *Arnett*, the plaintiffs here are challenging the constitutionality of portions of a statute under which they have simultaneously claimed and received benefits. They too, must take the bad with the good.

II. THE THREE JUDGE COURT ERRED IN RECEIVING AND IN CONSIDERING EVIDENCE RELATING TO THE APPEAL PERIOD WHICH FOLLOWED THE HEARING IN QUESTION.

A. Due Process Of Law Does Not Require The Right of Appeal.

In *Owsley* v. *Cunningham*, 190 F. Supp. 608 (E.D. Va., 1961), a habeas corpus proceeding, the Court said, page 611,

> ". . . it is a settled principle of law that the right of appeal is not essential to due process of law. *Standard Oil Company of Indiana* v. *State of Missouri*, 224 U.S. 270, 286-287, 32 S. Ct. 406, 56 L. Ed. 760. Rehearings and new trials are not essential to due process of law, either in judicial or administrative proceedings. *James* v. *Oppel*, 192 U.S. 129, 137, 24 S. Ct. 222, 48 L. Ed. 377."

Even in criminal matters there is no such right.

> "A review by an Appellate Court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities on the point is unnecessary." *McKane* v. *Durston*, 153 U.S. 684, 687-688. (S.D.N.Y., 1894).

See also *Kelly* v. *Metropolitan County Bd. of Ed. of Nashville and Davidson County, Tennessee*, supra, 492 and *Dixon* v. *Alabama State Board of Education*, 294 F. 2nd. 150, 155 (5th Cir. 1961).

B. The Issue Is The Sufficiency Of The Hearing Itself, Not What Happens Subsequent To It.

In *Goldberg* v. *Kelly*, supra, page 267, this Court said, " 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U.S. 385, 394, 34 Sup. Ct. 779, 783, 58 L. Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2nd 62 (1965)." The defendant's seated interview concerning a claimant's own activity during a two week period just ended constitutes a fair opportunity to be heard at a meaningful time and in a meaningful manner. Subsequent appeal for further hearings cannot dilute the fairness of the initial procedure. In allowing the introduction, over objection, of hearsay evidence concerning matters subsequent to this procedure, and in including findings based on this incompetent and irrelevant evidence, the court below committed error.

The lower court's holding on this point is comparable to a holding that an otherwise adequate trial denied due process because the appeal of one of the parties took too long to be heard by the appellate tribunal. But what of further delay before a final decision is reached? If a Commissioner affirms the defendant-administrator's decision, and the claimant then appeals to the Superior Court, does the added delay *a fortiori* make the hearing by the defendant-administrator constitutionally insufficient? Are the two successive time periods tacked together, and if then overly long, do they constitute a denial of due process? If it were the decision of the defendant-administrator (Fact Finding Examiner) that was delayed, there might be substance to plaintiffs' complaint and the lower court's holding. Since it is the decision on appeal, however, a decision which could take years when considering the claimant's remedy of appeal from the defendant to the

Commissioner, then to the Superior Court, and finally to the State Supreme Court, with intervening requests for reconsideration, such complaint and holding must fail. For these reasons, the lower court, in receiving and relying on evidence as to such "delays" as a prime reason for holding defendant's procedures to be lacking in due process, committed error. And since this was the basis on which the lower court distinguished this case from *Torres*, it is harmful error and must be reversed.

C. The Appeal To An Unemployment Compensation Commissioner Is A Matter Separate And Apart From The Hearing.

As stated previously, the Connecticut Unemployment Compensation Commission is an entity separate and apart from the defendant-administrator and the Employment Security Division of the Connecticut Labor Department; it prescribes its own regulations for the presentation and hearing of appeals. Neither the Commission as a whole nor any Commissioner in particular was named as a defendant in this action. Yet, it is the "delay" which occurs while claimants' appeals are pending before this body which the lower court found to be one of the reasons why due process was not afforded the plaintiffs. (Mem. Dec. 24; J.S. 24A) Defendant submits that such "delays" cannot be attributed to the defendant since he has no authority in the handling of these appeals, and his only participation in same is by way of his being a party to each appeal filed. We note that Steinberg's request for a continuance accounted for a 42 day "delay" in the hearing of his appeal.

Query too, whether such time lapses can properly be called "delays" when the decision appealed from is a decision that benefits are not due. If such a "delay" denies due process, then

such a denial is caused by the Unemployment Compensation Commission, and this action should therefore be dismissed as to the named defendant.

III. THIS COURT NEED ONLY ARTICULATE ITS REASONS FOR ITS PRIOR DECISIONS AND ACTIONS.

A. The Torres Decision Is Applicable And Should Be Followed.

In *Torres* v. *New York State Department of Labor*, supra, this Court held that informal hearings similar to that in issue here were constitutionally sufficient. That case was remanded for further consideration in light of the *Java* decision, supra, where the District Court again denied relief holding that *Java* was not applicable to the issue at hand. This decision was affirmed without memorandum, 405 U.S. 949 (1972), and a Petition for Rehearing was denied. 410 U.S. 971 (1973). The New York Court refused to follow *Goldberg* v. *Kelly* primarily because of the basic differences between Welfare and Unemployment Compensation. In properly distinguishing *Goldberg*, the *Torres* Court pointed out that *Goldberg* arose in the context of public assistance programs, and it said, page 436, "The distinction is vital. In its opinion the Supreme Court repeatedly emphasized the unique situation of the welfare recipient. . . ."And on page 437, the court said further, "In the absence of the 'brutal need' on which the Court rested its decision in *Goldberg*, the governmental interests to which the Court referred must be held to outweigh plaintiffs' claim."

In addition to the reasons based on the difference between the very nature of Welfare and Unemployment Compensation, this case, like *Torres*, is distinguishable from *Gold-*

berg because the claimants had the opportunity to present their cases to the decision-maker. This was not the case in *Goldberg* nor was it the case in *Wheeler* v. *Vermont*, 335 F. Supp. 856 (Dist. of Vt. 1971). In *Wheeler*, the claimant did not personally present her case to the decision-maker; rather, the decision was made by the local office manager acting as a claims-examiner who based his decision on fact finding reports prepared by another local office employee. Further, the appeal tribunal in *Wheeler* is part of that state's Department of Employment Security, a named defendant which is administered by the Commissioner of Employment Security, another named defendant. Unlike the situation in *Wheeler*, the Connecticut Unemployment Compensation Commission is not administered by the named defendant here, and is not a party to this action. Whatever the validity of the rationale expressed by the *Wheeler* Court, the basis for that rationale, i.e. administration of the appeal process, does not exist here.

By affirming the *Torres* decision, this Court approved the ruling that New York's administrative procedures prior to appellate review afforded Unemployment Compensation claimants due process of law. The reasons for that ruling in *Torres* also exist in this case: The claimants are afforded a fair opportunity to be heard at a meaningful time and in a meaningful manner. Indeed, Connecticut goes even further by its special procedures for monetary claims and certain "third-party" information claims, and because of its statutory presumption in claimant's favor. The *Torres* affirmance is consonant with the remand by this Court of *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540, (1973), and is evidence of this Court's consistent reluctance in unemployment compensation cases to apply the *Goldberg* rationale to the hearing procedures in question. Three times the *Torres* decision has been placed before this Court and twice the Court has in effect summarily affirmed after first remanding for reconsideration in light of *Java*. *Burney* was also before this

Court on the same issue, but was remanded for consideration as to mootness because *Burney*, the only named representative, had received full retroactive payments after receiving a post-termination hearing. The named plaintiffs in this action have also received post-termination hearings, and those ruled entitled have been paid. But the Connecticut District Court has already ruled that this case is not moot, and has issued an injunction pertaining to all class members, both present and future. In addition to the mootness argument, defendant has already argued unsuccessfully to that court that this Court's summary affirmance of *Torres*, in conjunction with its remand of *Burney*, should be interpreted as a statement to all that this Court is satisfied that *Torres* is dispositive in unemployment compensation cases. It is obvious, therefore, that until this is articulated, the lower courts will continue to go their own various ways. This Court need but follow its past actions in unemployment compensation cases, therefore, and reverse the lower court by holding that *Torres* is dispositive in such cases.

CONCLUSION

The lower court has failed to follow *Torres* on the constitutional question because of a reason applicable to the statutory question: the greater time lapse during the appeal period in Connecticut. The court was obviously concerned about the effects such delays would have on a claimant whereby he would ". . . have to rely upon savings or welfare while awaiting his hearing on the merits of the termination issue." (Mem. Dec. p. 19 J.S. 17A) The court completely overlooked the fact that such claimants need not appear at the local office two weeks later and show that they have met the requirements of the law during the intervening period. Just as a man jailed for contempt carries the key in his pocket, these plaintiffs carried the key to again receive benefits by

making reasonable efforts each week subsequent to the denial. The lower court, therefore, not only erred in receiving and considering such irrelevant and incompetent evidence and in misapplying it, but it also overemphasized its importance by overlooking the claimant's opportunity to qualify for and receive benefits for the very next week.

The lower court also erred in ruling that defendant's hearing procedures do not afford due process. The court has ignored the fact that in most cases, as in the case of each of the named plaintiffs, the only evidence necessary for a determination was given by the plaintiffs themselves; there were no adverse witnesses to confront or cross-examine, and no reason to consult an attorney, although they could have. Where there are adverse allegations, claimants are given the opportunity to rebut. These plaintiffs had collected benefits for prior weeks, and had notice of their obligations to be eligible for benefits for each week.

One can only guess at the reason for the lower court's disregard of these facts. Certainly the prejudicial information as to the "delays" could sway a sympathetic court. Whatever the reason, however, the lower court failed to see that these claimants are not victims of arbitrary or capricious action; they each have a full opportunity to tell their story, to rebut unfavorable information, to submit additional data, to bring with them documents, witnesses and counsel. Due process requires no more.

Defendant respectfully submits that its seated interview hearing procedures are fair to the claimants to the point of being weighted in their favor. For the reasons stated above, therefore, defendant respectfully requests that

the lower court's decision be reversed and that this Court rule that defendant's administrative hearing procedures do afford claimants due process of law.

Respectfully submitted,

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